MEMORANDUM

TO: Jason Gabriel, Office of General Counsel

FROM: Scott S. Cairns, McGuireWoods, LLP
W.C. Gentry, Law Office of W.C. Gentry, P.A.
Henry M. Coxe III, Bedell, Dittmar, DeVault, Pillans & Coxe, P.A.

DATE: August 2, 2019

RE: School Capital Outlay Surtax Referendum

The Duval County School Board ("School Board") passed a resolution to place before the voters of Duval County on November 5, 2019 a referendum regarding assessment of a one-half cent School Capital Outlay Surtax ("Surtax") pursuant to Section 212.055(6), Florida Statutes. The City Council has not yet acted on that issue.

In our recent meeting, you indicated that you are studying the issue of the City Council's role in considering the Board's resolution and planned to issue a formal opinion next week. You requested us to forward any research we had done on the issue. This memo contains that research. As you will see, we believe the law is clear that the City Council has no "discretion" to avoid the requirements of Section 212.055 or to take on "super school board" oversight of the School Board's decision. Accordingly, in order to effect the intention of the legislature, the statute requires the City Council to place the referendum on the ballot promptly.

I. Introduction

The School Board passed a resolution to place before the voters of Duval County on November 5, 2019 a referendum regarding assessment of a one-half cent Surtax pursuant to Section 212.055(6), Florida Statutes. Section 212.055(6) provides that when the School Board passes such a resolution, it "**shall** be placed on the ballot by the governing body of the county" (emphasis added), which is the Jacksonville City Council. Despite the ministerial duty created by Section 212.055(6), the City Council has indicated an unwillingness to place the referendum on the ballot. The City Council's position is contrary to a plain reading of the statute and relies on a fundamental misapprehension of its power vis-à-vis the School Board.

II. Analysis

a. The City Council has a Mandatory/Ministerial Duty to Place the Referendum on the Ballot.

According to Black's Law Dictionary, a "ministerial act" is "an act performed without the independent exercise of discretion or judgment." Black's explains, "If the act is mandatory, it is also termed ministerial duty." ACT, Black's Law Dictionary (11th ed. 2019); *see also Shulmister v. City of Pompano Beach*, 798 So. 2d 799, 802 (Fla. 4th DCA 2001) ("A duty or act is defined as ministerial

where there is no room for the exercise of discretion, and the performance being required is directed by law.").

The plain language of Florida Statutes, Section 212.055(6) demonstrates that the City Council's duty to place the referendum on the ballot after approval by the School Board is mandatory/ministerial. In construing statutes, it is the duty of a court to give a word its plain and obvious meaning. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004). Courts are not permitted to attribute to the legislature an intent beyond that expressed, *Board of County Commissioners of Monroe County v. Department of Community Affairs*, 560 So. 2d 240, 242 (Fla. 3d DCA 1990); nor may a court speculate about what should have been intended. *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946, 949 (Fla. 1988); *Tropical Coach Line, Inc. v. Carter*, 121 So. 2d 779, 782 (Fla. 1960). Therefore, statutory construction begins with the plain language of the text.

Florida Statutes, Section 212.055(6) provides that a referendum passed by the School Board "**shall** be placed on the ballot by the governing body of the county." (emphasis added). The word "shall" is defined in Black's Law Dictionary as "Has a duty to; more broadly, is required to." SHALL, Black's Law

Dictionary (11th ed. 2019). Black's explains, "This is the mandatory sense that drafters typically intend and that courts typically uphold." *Id*. It further explains that "shall" can mean "may" "[w]hen a negative word such as *not* or *no* precedes *shall*," e.g., "no person shall enter the building without first signing the roster." In Section 212.055(6), a negative word does not precede "shall." Thus, the statue's plain language indicates that "shall" should be given its mandatory sense.

Unsurprisingly, Florida courts give "shall" its plain meaning**.** The Supreme Court of Florida has repeatedly expressed its view that "the word 'shall' is mandatory in nature." *Sanders v. City Of Orlando*, 997 So. 2d 1089, 1095 (Fla. 2008), *as revised on denial of reh'g* (Dec. 18, 2008); *see also The Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002) ("The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.'").

Florida courts have repeatedly used the plain meaning to reject arguments that "shall" should mean "may." In *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973 (Fla. 2017), *reh'g denied*, No. SC15-2298, 2017 WL 1130950 (Fla. Mar. 27, 2017), medical services providers argued that an insurance policy was ambiguous "because the term 'shall' can reasonably be construed as 'must' or 'may.'" *Id.* at 978. The court noted that "shall" can be construed as "may" in

limited circumstances but "it is normally meant to be mandatory in nature." *Id.* The court looked at the context of the word in the policy and found "[n]othing within Allstate's policy indicat[ing] that this Court should construe the word 'shall' contrary to its normal usage." *Id.*

In *Board of County Commissioners Broward County Florida v. Parrish*, 154 So. 3d 412, 414 (Fla. 4th DCA 2014), the court considered whether to issue a writ of mandamus to compel action by a board of county commissioners. The court held that the board's duty was ministerial rather than discretionary and thus could be the subject of mandamus relief. The court highlighted the mandatory language of the operative statute:

> [S]ection 192.091(1)(a), Florida Statutes (2013), provides that "[t]he budget of the property appraiser's office, ***as approved by the Department of Revenue, shall be the basis*** upon which the several tax authorities of each county, except municipalities and the district school board, ***shall be billed by the property appraiser for services rendered***." (emphasis in original). The statute further directs that payments to the property appraiser "***shall be made quarterly*** by each such taxing authority." § 192.091(1)(b), Fla. Stat. (2013). (emphasis in original)

154 So. 3d at 420.

In addition to the plain meaning of "shall," the context of the surtax statute also demonstrates that the City Council's duty to place the referendum on the ballot is ministerial. Florida Statutes, Section 212.055(6) includes discretionary and ministerial duties. In part (a), it provides that the school board "**may**" levy a

discretionary sales surtax. In part (c), it provides that the surtax revenues "**may**" be used for the purpose servicing bond indebtedness, and any interest accrued "**may**" be held in trust. Part (b), by contrast, uses mandatory language for the City Council's duty. It states that the referendum passed by the School Board "**shall** be placed on the ballot by the governing body of the county."

The statutory context establishes that the legislature considered whether to make the duties in this portion of the statue discretionary or mandatory, and decided to make the City Council's duty to place the School Board's referendum on the ballot mandatory. The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended. *See Ocasio v. Bureau of Crimes Comp. Div. of Workers' Comp.*, 408 So. 2d 751, 753 (Fla. 3d DCA 1982) ("Its deliberate use of a quite different term in (2)(c) is strong evidence indeed that it intended a quite different meaning."); *see also Fla. State Racing Comm'n v. Bourquardez*, 42 So. 2d 87, 90 (Fla. 1949) (citation and internal quotation omitted) ("The use by the legislature of certain language in one instance and wholly different language in the other indicates that different results were intended and the courts have so presumed. Under this rule, where language is used in one section of the statute different from that used in other sections of the same chapter it is to be presumed that the language is used with a different intent.").

This principle of "deliberate use" was applied to differentiate between "shall" and "may" in *Brooks v. Anastasia Mosquito Control Dist.*, 148 So. 2d 64 (Fla. 1st DCA 1963). In that case, the appellants contended that the word "may" should be construed as "shall" due to the context of the statute at issue. The court did not agree. The court explained, "It must be assumed that the Legislature of this state must know the plain and ordinary meaning of words and that the word 'may' when given its ordinary meaning, denotes a permissive term rather than the mandatory connotation of the word 'shall'." *Id.* at 66. The court noted that "in other provisions of the same chapter, which are definitely mandatory, the Legislature used the word 'shall'." The court thus concluded that "if the Legislature had meant to say 'shall' we think it would have so provided." *Id.*; *see also Geico Gen. Ins. Co. v. Virtual Imaging Servs., Inc.*, 141 So. 3d 147, 157 (Fla. 2013) ("In contrast to this MRI-specific language, the Legislature did not state in the 2008 amendments that a provider's charge "shall not exceed" a certain allowable amount of the Medicare fee schedules. Instead, the Legislature specifically used the word "may" to reference an insurer's ability to limit reimbursement.").[1]

The City contends that because there is no specific time prescribing when the City Council must place the referendum on the ballot, the legislature granted

[1] The Fourth Circuit in a previous similar matter in Clay County held that "shall means shall," *School Board of Clay Cnty., Fla. v. Clay County*, No. 2014-CA-983 (Fla. 4th Cir. Ct.), and the Attorney General likewise issued an opinion to that effect, AGO 98-29.

discretion to the City Council, and thus the duty is not ministerial. In fact, the "Statement" passed by the School Board does include the date for a vote by the electors—November 5, 2019—thus removing any discretion the City Council may have otherwise had.

Regardless, in Florida Statutes, Section 212.055 the legislature has shown its ability to differentiate appropriately between granting discretion and mandating a ministerial act. For instance, in two sections of that statute the legislature explicitly provided some discretion to determine when a proposal should be placed on the ballot. *See* Fla. Stat. § 212.055(1)(c), (5)(b) (stating that the proposal "shall be placed on the ballot in accordance with law **at a time to be set at the discretion of the governing body**") (emphasis added).[2] By contrast, for the six other sections, including the section at issue here, the legislature did not provide this discretion. *See* Fla. Stat. § 212.055(2), (3), (4), (6), (7), (8) (stating that the referendum "shall [or "must" in section 8] be placed on the ballot by the governing authority of any county.").

Notably, both sections (2) and (6) can be initiated by distinct governmental entities (a majority of municipalities in section 2 and the county school board in section 6) and both require the governing authority of the county to act, without

[2] Notably, the legislature also knows how to remove this discretion. Effective January 1, 2020, the referenda under these two sections are required to be held at a general election. *See* Chapter 2019-64, Laws of Florida, Section 1.

the discretion allowed in other sections. Moreover, the legislature only mandated that referenda pursuant to section (8) occur at a regularly scheduled election. Fla. Stat. § 212.055(8)(b). This further shows the legislature's ability to differentiate appropriately between mandatory and discretionary acts within the various sections of this statute. Here, the legislature has not granted the City Council discretion nor directed that the referendum occur at a regularly scheduled election.

In addition, the fact that a statute does not mandate a specific time for an act to be done does not, in itself, change the nature of the act from ministerial to discretionary. For example, in *Wright v. Frankel*, 965 So. 2d 365 (Fla. 4th DCA 2007), the court determined that the City Commission had a ministerial duty to submit a proposed ordinance to the voters anywhere between 30 and 90 days after its final decision not to adopt the ordinance. Despite the discretion in timing, the court still ruled that the duty to put the ordinance on the ballot was a ministerial duty. Similarly, in *Leach v. City of San Diego*, 220 Cal. App. 3d 389, 393, 269 Cal. Rptr. 328, 330 (Ct. App. 1990), the court determined that the city had a ministerial duty to draft water from one reservoir to another despite the fact that the city had discretion as to the timing of the drafting. *Id.* (finding the duty was ministerial where "[t]he only decision to be made is the timing of the drafting, not the method").

Indeed, "A ministerial duty is one which is positively imposed by law to be performed **at a time and in a manner or upon conditions** which are specifically designated by the law itself absent any authorization of discretion to the agency." *Solomon v. Sanitarians' Registration Bd.*, 155 So. 2d 353, 356 (Fla. 1963) (emphasis added). Though Florida Statutes, Section 212.055(6), does not provide the specific time for action, it does state the specific condition upon which the ministerial duty arises—the School Board's decision to levy a discretionary sales surtax.

The legislature has given the City Council a ministerial duty that cannot be frustrated by delaying action *ad infinitum*. *Sch. Bd. of Marion Cty. v. Fla. Pub. Employees Relations Comm'n*, 341 So. 2d 819, 822 (Fla. 1st DCA 1977) ("A statute should not be construed so as to bring unreasonable or absurd consequences when, considered as a whole, the statute is fairly subject to another construction which will aid in accomplishing the manifest intent and purposes designed."). The City Council's recent actions of committee referral, re-referral, re-re-referral, and then deferral is, in effect, "denying justice by delay." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964). This unnecessary delay obstructs the Constitutional and statutory authority of the School Board and more importantly delays the needed infrastructure improvements for local schools and the children that attend them. To interpret the statute to allow such delay brings the

unreasonable and absurd consequence of having the City Council, not the School Board, decide whether to levy the Surtax. Accordingly, in order to affect the intention of the legislature, the statute requires the City Council to place the referendum on the ballot.

b. A Court has the Power to Order the City Council to Place the Referendum on the Ballot.

Due to the ministerial nature of the City Council's duty, its refusal to act is ripe for repudiation by a writ of mandamus. Mandamus is a common law remedy used to enforce an established legal right by compelling a person in an official capacity to perform an indisputable ministerial duty required by law. *Poole v. City of Port Orange*, 33 So.3d 739, 741 (Fla. 5th DCA 2010) (citing *Puckett v. Gentry*, 577 So. 2d 965, 967 (Fla. 5th DCA 1991)). Central to mandamus relief is the ministerial character of the compelled action—a situation arising where there "'is no room for the exercise of [the respondent's] discretion, and the performance being required is directed by law.' " *Wright*, 965 So. 2d at 370 (*quoting Shulmister v. City of Pompano Beach*, 798 So.2d 799, 802 (Fla. 4th DCA 2001)).

As discussed above, the City Council's duty to place the referendum on the ballot is mandatory/ministerial. The City, however, argues that it would violate the separation of powers for a court to order the City Council to place the referendum on the ballot. In fact, the power of courts to issue a writ of

mandamus to order a legislative body to perform a ministerial act does not raise separation of powers issues. Indeed, Florida courts have repeatedly ordered legislative bodies to take steps to put ballot initiatives before voters.

In *Sterling v. Brevard Cty.*, 776 So. 2d 281 (Fla. 5th DCA 2000), *as modified on reh'g* (Jan. 19, 2001), a charter review commission (CRC) sought an order requiring the county commission to call a special election on proposed charter amendments. Under Brevard County's charter, the CRC proposes charter amendments and sends them to the county commission, which must adopt them or place them on the ballot for a vote of the people. In this case, the CRC sent amendments to the county commission and the commission refused to adopt them or place them on the ballot. The court ruled, "[T]he trial court shall issue a mandatory injunction to the County Commission of Brevard County to either adopt some or all of the six proposed amendments or place those not adopted on the ballot in the next general election or in a special election." *Id.* at 285.

In *Wright v. Frankel*, 965 So. 2d 365 (Fla. 4th DCA 2007), a petition committee that proposed ballot initiatives on the relocation of city hall and a library filed a complaint for issuance of writ of mandamus to require the city to set an election on the initiatives. The relevant statute provided that "If the City Commission fails to pass an ordinance proposed by initiative petition . . . the proposed or referred ordinance **shall** be submitted to the electors in its original

form not less than thirty (30) days nor more than ninety (90) days after the final vote thereon by the City Commission." *Id*. at 370 (emphasis added). The court determined this created a ministerial duty, and ruled, "Because the City failed to comply with its legal duty to either adopt the Committee's proposed ordinances or submit them to the electorate in a referendum election, the trial court erred in quashing the alternative writ of mandamus and denying the Committee's motion for summary judgment." *Id*. at 373.

In *School Board of Clay Cnty., Fla. v. Clay County*, No. 2014-CA-983 (Fla. 4th Cir. Ct.), a school board sought an order via writ of mandamus requiring the Board of County Commissioners to promptly issue a resolution directing the supervisor of elections to place the proposition on the ballot. Under Section 1001.461, a school board may seek to make a superintendent appointive by passing a formal resolution requesting an election at a general, statewide primary, or special election. Upon timely request, the statute directs that the board of county commissioners "**shall** cause to be placed on the ballot at such election the proposition to make the office of district school superintendent appointive." *Id.* (emphasis added). After the Clay County Board of County Commissioners refused to place the referendum on the ballot at the election selected by the Clay County School Board, instead setting it two years later, a petition for writ of mandamus was filed and eventually granted. The court found

the duty ministerial, requiring the board to meet by a date certain and pass a resolution to set the referendum election.

Similarly, here, Section 212.055(6) is clear and unambiguous. The purpose is made clear in its opening sentence, "The school board in each county may levy, pursuant to resolution conditioned to take effect only upon approval by a majority vote of the electors of the county voting in a referendum, a discretionary sales surtax at a rate that may not exceed 0.5 percent." Fla. Stat. § 212.055(6). Accordingly, the statute must be interpreted in a manner to accomplish this purpose. *See State v. Mosley*, 149 So. 3d 684, 686 (Fla. 2014) (noting statutory language cannot be construed to render it potentially meaningless and courts must interpret statutes to accomplish rather than defeat their purpose). To accomplish the purpose of the statute, the School Board must have the authority to select the election. To interpret this statute in any other manner effectively gives the City Council a veto pen over any resolutions submitted to it by the School Board. That is an improper and impermissible construction of the statute.

III. Conclusion

The School Board is a constitutional body with powers and obligations created by the Constitution and laws of Florida. The City of Jacksonville Consolidated Government and City Council must respect and cannot impinge upon these powers and obligations. Among the School Board's obligations and

powers is to provide a safe, secure, and high quality education, including the school facilities, and it has all powers necessary to carry out that responsibility—including seeking tax revenue pursuant to Section 212.055. *See* Fla. Const. art. IX, §§ 1, 4; Fla. Stat. § 1001.32(2). The City Council has no "discretion" to avoid the requirements of Section 212.055(6) and must perform its ministerial duty of placing the referendum on the ballot forthwith.